Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

COMMENTS OF ALLIANCE FOR PUBLIC TECHNOLOGY

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SUMMARY

The Alliance strongly supports the concept of the open video system (OVS) because of the marked contribution that it can make to First Amendment goals in the near future (i.e., the next decade). Experience shows that the other main alternative course, to operate as a cable television system under Title VI of the Communications Act, has most serious First Amendment drawbacks.

Accordingly, we urge that the Commission adopt an approach of maximum business flexibility as to the matters specified in the Notice, so long as it is consistent with the overriding goal of an open video service. There will inevitably be disputes but these should be promptly resolved by the Commission within the specified 180 days. The Commission should therefore very largely use the standards of the 1996 Act in its implementing rules, and go further only where clarification is clearly in order (e.g., calculation of the operator's one-third selection share).

This approach will afford maximum flexibility and experimentation and thus will be an incentive for carriers (or cable companies) to adopt OVS. A contrary aproach, while well intentioned, may well result in a repeat of the Video Dial Tone (VDT) experience: In theory, VDT best served First Amendment interests but in practice it faced serious regulatory burdens, and more important, conflicted with marketplace demands in light of established cable television operations. We agree with the thrust of the Notice that the Commission must steer a course that strikes a pragmatic balance -- yet preserves the essential purpose of a truly open service, to a large extent.

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
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Implementation of Section 302 of of the Telecommunications Act of 1996	)	CS Docket No. 96-465
	)	
Open Video Systems	)	

COMMENTS OF ALLIANCE FOR PUBLIC TECHNOLOGY

The Alliance for Public Technology (APT) submits comments in response to the Notice of Proposed Rulemaking (herein Notice) in the above entitled proceeding. APT is a nonprofit organization with diverse membership, dedicated to promoting a maximum contribution by the telecommunications and information industries to the quality of life of all Americans. Its main interest in this proceeding involves the potential of open video systems (OVS) to make a marked contribution to the First Amendment goals of diversity of programming and of programming sources. See Associated Press v. United States, 326 U.S. 1, 20 (1945). These comments are directed to that major interest, and thus do not deal with the nitti-gritti of the many facets of this proceeding (and as to which APT lacks expertise).

I. The clear superiority of OVS over the cable television approach from a First Amendment standpoint.

There is no need for extensive discussion on this point. The Congressional scheme is clear. The Video Dial Tone (VDT) approach, while a superb choice from the standpoint of enhancing First Amendment values, proved to be a non-starter in the marketplace (and also because of regulatory burdens). Congress therefore

eliminated the VDT regime. But it did not rely for video distribution solely on the existing methods such as multichannel multipoint distribution service (MMDS) or cable television. It opted for OVS because it wanted to put before the telcos (and cable operators also) a scheme that was open, to a large extent, to all video program distributors, and thus strongly served the Associated Press principle.

It is important to bear in mind the flaws of the cable model in this important respect. Aside from "must carry" and PEG channels, the cable operator determines what programs are carried on its system.[1] This has resulted in most serious First Amendment consequences. Thus, as set out in the FCC's 1990 Cable Report (FCC 90-276, July 31, 1990, at pars. 121-123), when NBC sought in 1985 to enter the general cable news market as a competitor to CNN, TCI refused carriage, and NBC was forced to develop CNBC, a consumer news and business channel to gain carriage.[2] In 1993, CBS tried to get MSO acceptance for a competing news channel and ran into a stone wall. In a 1994 interview, Rupert Murdoch, chairman of News Corporation, stated that he "would have liked to start a news

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[1] The commercial leased channel requirements of Section 612 of the Act were intended to alleviate this problem, but as the Commission well knows, they have been ineffectual since their enactment in 1984. See D. Lampert, Cable Television Leased Access, The Annenberg Washington Program, 1991. The Commission continues to struggle in its effort to make these requirements effective.

[2] NBC's Chairman testified that "a number of large Multiple System Owners [MSOs] insisted as a condition of carriage that CNBC not become a general news service in competition with CNN, which is owned in part by TCI, Time Warner, Viacom, and other MSOs." FCC Report, supra, at par. 120.

channel but [TCI President John] Malone and [Time Warner Chairman] Gerald Levin would not give me the time of the day," and that "there are at least four companies, perhaps five, that would like to start a 24-hour news channel" but cannot obtain MSO distribution.[3]

The cable model is thus a First Amendment horror story: The underlying premise of the First Amendment is that the American people receive information from as diverse sources as possible, yet the cable model has restricted the American people to a single 24-hour news channel for over a decade, and only now is there the possibility of some breakthrough.

It is clearly sound policy to ensure access to all providers. Thus, today any information service provider can start a newsletter and send it out through the mail or fax it over the telco's narrowband facilities, and the market will determine its success or failure. There should be a similar large opportunity for access in video distribution. Technology will undoubtedly solve this problem sometime in the next century, with switched video systems (where the very concept of the channel becomes obsolete) and even before then with the movement to digital transmission, with its compression techniques thus affording access to several hundred channels. But that is the future. Policy must be made for the next decade. The OVS approach has been afforded by Congress as the last opportunity for substantial open access in that decade.

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[3] See Broadcasting & Cable Mag., Jan. 17, 1994, at 8; Jan. 24, 1994, at 22.

II, The guiding principles for Commission implementation of OVS.

The guiding principles for implementation of OVS are, we believe, readily stated. But their actual application will be most difficult because the principles call for the Commission to walk a tightrope. The Devil here truly is in the details.

The first and most obvious principle is that the service must be open to the large extent called for by the 1996 Act. If the Commission permits implementation that results in the OVS operator, in practical effect, doing all or virtually all the selection and thus really operating as a cable system would, the statutory scheme will be subverted. Rather than pretending that there is an open service provider, the Commission should take the position that if the telcos or others believe that they cannot effectively operate under such an open system, they should seek a cable franchise or an MMDS, LMDS, DBS, etc., license. There is no sense at all repeating the fiasco of cable commercial leased access in this area.

But there is also no sense in repeating the mistake of VDT: The OVS distributor must have that degree of flexibility and business discretion sufficient to allow it to compete with the existing multichannel video operators in the market, especially cable television. That is the second principle to be followed, because otherwise there is no sound business prospect and OVS will be a dead letter.

The third principle also stems from the clear Congressional scheme: Unlike VDT with its burdensone common carrier

requirements, the new OVS entrants "...deserve lighter regulatory burdens to level the playing field,"[4] and thus at local level, there is no regulation (except for payment of the franchise fee) and at the Federal level the regulation is to be streamlined and reduced.

These principles are soundly stated in the Notice, at par.13:

> ...In considering whether the Commission should adopt any specific rules concerning the allocation of capacity, we intend to weigh whether a particular approach will furnish open video system operators with the flexibility and independent business discretion permitted under the 1996 Act to compete with existing multichannel video programming distributors in the market, while implementing the 1996 Act's requirement of preserving non-discriminatory access to open video systems by video programming prodivers. Our goal is to try to achieve this delicate balance, while, at the same time, adopting the least regulatory approach possible.

III. <u>The recommended approach.</u>

To fashion an approach that melds the above three principles -- that achieves the "delicate balance" referred to above -- will be difficult. We believe that with only a few exceptions where clarification is clearly needed at this time (e.g., how to measure the operator's one-third share of activated channels where it can select the programmer), the Commission should avoid adopting specific rules to flesh out in some detail the approaches to be taken in areas like channel allocation, analog/digital, channel positioning, just and reasonable rates, access for cable operators, etc. The result will be a mess, and an effort that, however well intentioned, we believe will almost inevitably discourage the

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[4] Conference Report, at 178.

development of OVS. Rather, we urge that applying the test set out in par. 13, the Commission should generally repeat the statutory standards, call for good faith negotiation between the OVS operator and programmers, and promptly resolve disputes, which are inevitable, within the short time frame prescribed by the statute (180 days). In this way, telcos and others will be encouraged to enter the OVS field, the Commission will quickly gain expertise through concrete market developments, and can act to remedy specific cases and to develop specific rules on the basis of the market experience so gained.

The approach is similar to that adopted by the Congress as to the 14 point interconnection checklist for RBOC entry into the interexchange field. The statute sets out the standards, calls for negotiation between the parties, and in the event of a dispute, mediation and finally resolution by the state commissions within a specified period (nine months after the initial request for the interconnection facet). Here the scheme would call for the same process but resolution in the event of a dispute would be by the Commission within a six months period.

The approach thus parallels that set out as one option in par. 12 of the Notice, but on a broader basis:

> One approach would be to adopt a regulation that simply prohibits an open video system operator from discriminating against unaffiliated programmers in its allocation of capacity; we would allow the open video system operator latitude to design a channel allocation policy consistent with this general rule. The Commission would rule on complaints alleging discrimination on a case-by-case basis, and, if a violation were found, could require carriage and/or award damages to any person denied carriage, or provide any other remedy available under

> the Communications Act. [footnote omitted] Such an approach would provide operators with maximum business flexibility. In addition, this approach may be the most effective in encouraging telephone companies to begin providing service over open video systems...

The last statement is accurate. We stress again, however, that the Commission should encourage such OVS entry only upon the clear admonition that if the OVS operator is not prepared to afford truly open access to the non-affiliated channel share, it should not enter at all. The consequence of trying to operate an OVS system like a cable television system will be adverse rulings in complaint cases, and a prompt need to issue specific rules to deal with such a flagrant subversion of the very purpose of this scheme.

As stated, there is a need for clarification of some provisions of the Act at this time. We would also comment on one other issue -- that of cost allocation between the OVS operation and the telecom operation in an integrated system. This issue is presented whether the video operation is cable or OVS, so long as a system integrating both telecom and video distribution is employed. It must be resolved because the Commission in any event is required to insure proper cost allocation in light of its responsibities in the telecom (Title II) sector. There are arguments that the matter can and should be treated under Part 64 and through the use of price caps in the telecom area; these arguments were subject to dispute in VDT regime. We respectfully suggest that the Commission should move expeditiously to settle the issues so raised. While that is, of course, not possible within any 10 day OVS certification process, that does not mean that their speedy

resolution is not called for, in light of the broad applicability of the issue.

CONCLUSION

For the foregoing reasons, the Commission should proceed generally along the approach set out in point III, but with heavy emphasis on the need to maintain the first principle -- truly open access to a large portion of the OVS operation.

Respectfully submitted,

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